



## EXCERPTED PROCEEDINGS

(10:08 a.m.)

THE COURT: Good morning. Be seated, please. Good morning Mr. Riley, Mr. Szekely, we're here to continue our trial with the presentation of opening statements. I take it that the government's ready to proceed this morning?

MR. RILEY: Yes, Your Honor.

THE COURT: As is the defendant?

MR. SZEKELY: Yes, we are Your Honor.

THE COURT: And the defendant is present.

THE DEFENDANT: Yes, sir.

THE COURT: Before we start, I want to make a brief record on something and then hear counsel's views. After the jury was assembled in the jury room this morning, in anticipation of coming into the courtroom to hear opening statements, the courtroom deputy clerk was approached by juror No. 11, and then juror No. 5 joined in the discussion. And my understanding from a discussion with my courtroom deputy clerk is that juror No. 11 expressed concern that when that juror was departing the jury room last night that certain unspecified person or persons were quote, watching, close quote, him or her. Juror No. 5 joined in the expression of that concern.

The courtroom deputy under my instruction and supervision responded only by indicating that if they had any



1 such concerns going forward they should express them to the  
2 courtroom deputy or to any of our court staff, to include our  
3 court security officers, and to point out whatever  
4 circumstance it might be that is making them uncomfortable.  
5 But beyond that, there was no elaboration and the matter was  
6 left alone.

7 Beyond that, outside the knowledge and hearing of  
8 the jury, I have made arrangements with the Marshals to ensure  
9 that we do have a court security officer on post outside the  
10 courtroom door and outside the jury room door, just generally  
11 present, observing all people who are present there and the  
12 circumstances and so forth, as the jury moves in and out of  
13 the jury room.

14 Does the government have any reaction to the record  
15 that I have just made, Mr. Riley?

16 MR. RILEY: No, Your Honor. The measures appear to  
17 be more than sufficient, Your Honor.

18 THE COURT: Mr. Szekely, any reaction, concerns,  
19 anything else you want to place on the record?

20 MR. SZEKELY: No issue at all with the Court's  
21 remedy or how the Court's going to proceed as we go forward.  
22 I have sort of two points to briefly put on the record. One  
23 this is, given some of the evidence that's going to be coming  
24 into this trial, regarding what the government may term as Mr.  
25 Small's attempts at obstructing justice, this is, I think

1     troublesome, if sort of stuff outside of the courtroom that is  
2     beyond the control of anyone at this table is happening, that  
3     could effect that. And I do think it's sort of much ado about  
4     nothing in the end.

5             My other concern is whether the courtroom deputy had  
6     instructed these two jurors to not discuss that with any other  
7     jurors. So I'm worried are they back there now talking about  
8     what happened when they left yesterday. Now we've got 16  
9     people back there now worried about something. That's our  
10    other concern.

11            THE COURT: Well, I hear your concern. Are you  
12    making a specific request? And as you consider what request  
13    you might want to make, I think you should also think through  
14    the prairie fire aspect of all of this, you know, what happens  
15    when you tell people don't think about elephants?

16            MR. SZEKELY: Correct.

17            THE COURT: They start thinking about elephants.  
18    The power of suggestion. There's nothing that has happened  
19    here that's been generated by the Court or the government, or  
20    frankly, the defense side. This is just a circumstance that  
21    has evolved based on independent jurors apparent perceptions,  
22    possibly misperceptions of things. I'm not in a position  
23    where I can tell the jurors that they're imagining things,  
24    that nothing happened. I have no idea. And none of us does,  
25    we weren't out there yesterday afternoon. And the sort of



1 concern that was expressed is of a pretty vague nature. So  
2 trying to otherwise remedy it and ramp up the response in a  
3 way that the jurors would perceive that we were reacting to,  
4 it seems to me causes more harm than good. So I'm not hearing  
5 a specific request from you.

6 MR. SZEKELY: There's no request. We may at some  
7 point have a -- some sort of request for relief. Nothing at  
8 this moment.

9 THE COURT: Okay. Very good. Goes without saying,  
10 the jurors are not in the courtroom, they can't hear this.  
11 All parties are instructed that it would be highly improper,  
12 if not out right obstruction of justice, a federal offense,  
13 for anyone to attempt to communicate directly or indirectly  
14 with jurors in this case about their service, about their  
15 conduct, about their actions as jurors. And everyone's on  
16 notice that this court will protect the integrity of this  
17 process no matter what it takes. Okay.

18 MR. SZEKELY: Your Honor, can I just step back and  
19 speak with my assistant, who's in the gallery for one  
20 moment.

21 THE COURT: Absolutely.

22 And also this is not set up correctly, the podium is  
23 on the wrong side of the electrical box. How are the lawyers  
24 supposed to work with the cord right in front of them? Thank  
25 you.

1 (10:16 a.m., end of first excerpt.)

2 (11:51 a.m., beginning of second excerpt)

3 THE COURT: Are we ready for the jury?

4 MR. SZEKELY: Your Honor, we'd like to address one  
5 matter outside the presence of the jury.

6 THE COURT: Go ahead.

7 MR. SZEKELY: And I know Mr. Riley -- Your Honor, at  
8 this time -- Mr. Small, you can have a seat -- Your Honor, we  
9 would move, at this time, to excuse those two jurors we  
10 discussed earlier today. Jurors No. 5 and 11, and in their  
11 stead seat the first two alternates.

12 The individuals who I saw, and Ms. Abelson saw when  
13 we left the courtroom yesterday, were family members -- was a  
14 family member of Mr. Small's, his aunt, who was asked to come  
15 to court actually as a government witness. The government may  
16 or may not be calling her later in the trial, and another  
17 family member who accompanied her. So those were the only two  
18 people out there.

19 It's my concern that, on behalf of Mr. Small, that  
20 the jurors, based on what those two jurors said happened,  
21 are -- will associate what is concerning to them with Mr.  
22 Small. And, of course, they don't know it's his aunt but we  
23 do. But they will associate those individuals waiting outside  
24 Mr. Small's courtroom, no one else was in the hall, with Mr.  
25 Small. And that would, combined with the later expected



1 evidence the government will argue is evidence of obstruction  
2 of justice, would influence their verdicts in such a way that  
3 they would no longer be the fair and impartial verdicts --  
4 fair and impartial jurors to which Mr. Small is entitled.

5 So the relief we're seeking, we would ask the Court  
6 to excuse those two jurors, seat the first two alternates.  
7 But before the jurors are formally excused, and once it's  
8 confirmed the alternates will be seated, we would ask that  
9 they be voir dired about what they told the other members of  
10 the jury about what happened or what they saw before they're  
11 formally excused. And, again, if the Court is disinclined to  
12 grant our motion to excuse those jurors, we would not ask them  
13 voir dired. We would only ask them to be voir dire in the  
14 event that the Court grants our motion to excuse them and seat  
15 the alternates.

16 THE COURT: Why wouldn't the appropriate course be  
17 to voir dire them first and find out if there's a problem or  
18 not?

19 MR. SZEKELY: Well, Your Honor, I think what the  
20 Court said was exactly -- that we don't want to draw undue  
21 attention to it if it's not needed. I think based on the  
22 record before the Court now, there's sufficient basis to  
23 excuse those two jurors and then inquire further about what  
24 other jurors may have learn about it. And then we'll have to  
25 see where we are. That's where we are and that's our request

1 for relief.

2 THE COURT: What's the government's position?

3 MS. WILKINSON: Your Honor, there's nothing in this  
4 record that suggests No. 1, that's who the jurors saw. Or No.  
5 2, that the jurors have any idea that they are related somehow  
6 to Mr. Small. They -- I don't believe his brother is going to  
7 be a witness in this trial. And there's discussions afoot  
8 about the other female that was out there about stipulating as  
9 to her testimony. But more importantly, the jurors don't know  
10 who those people were. There's no record that those are the  
11 people they even saw.

12 I think that the Court has handled it completely  
13 appropriately at this point by putting a mechanism, because  
14 there's a lot of activity in this courthouse today and will be  
15 this week, of a lot of different people coming in and out. We  
16 have no idea what those jurors saw or didn't see, or how they  
17 correct connected it to this case.

18 THE COURT: Mr. Goldsmith. Please stand, raise your  
19 right hand.

20 (Courtroom Deputy Clerk sworn.)

21 THE CLERK: I do.

22 THE COURT: Mr. Goldsmith, how are you employed?

23 THE CLERK: I'm a courtroom deputy clerk for the  
24 U.S. district court, clerk's office.

25 THE COURT: And how long have you so served?



1 THE CLERK: 36 years.

2 THE COURT: And were you on duty in courtroom 3D,  
3 this courtroom, earlier today attending to your  
4 responsibilities as a courtroom deputy clerk?

5 THE CLERK: Yes.

6 THE COURT: In that regard, did you encounter the  
7 jurors before court had actually formally opened this morning?

8 THE CLERK: Yes.

9 THE COURT: Did you encounter them in the jury room?

10 THE CLERK: Yes.

11 THE COURT: Did you have occasion to speak to juror  
12 No. 11?

13 THE CLERK: Yes.

14 THE COURT: Tell the Court how that conversation was  
15 initiated.

16 THE CLERK: The individual juror brought to my  
17 attention her concerns regarding the fact that she had seen,  
18 at the time she left for the day yesterday, individuals  
19 outside the jury room, and that made her uncomfortable.

20 THE COURT: Okay.

21 THE CLERK: Those individuals had -- one or both  
22 individuals had a cell phone.

23 THE COURT: How did she characterize the conduct or  
24 activities of the persons who gave her concern, what were  
25 those persons doing?

1 THE CLERK: She did not specifically say, to my  
2 knowledge, she just came across uncomfortable.

3 THE COURT: She said that she saw them, and that  
4 made her uncomfortable.

5 THE CLERK: That is correct.

6 THE COURT: And she didn't otherwise describe what  
7 their conduct was or how they were behaving or anything?

8 THE CLERK: Not that I can recall.

9 THE COURT: She made reference to the fact that one  
10 or more of them were holding cell phones?

11 THE CLERK: That is correct.

12 THE COURT: Did she indicate what they were doing  
13 with the cell phones?

14 THE CLERK: Did not.

15 THE COURT: Did she indicate whether she thought  
16 that she was being photographed or videoed in any way?

17 THE CLERK: Did not have that indication.

18 THE COURT: Okay. Were there any other  
19 communications between you and juror No. 11 on this topic?

20 THE CLERK: No.

21 THE COURT: Did you say anything in response to her,  
22 did you attempt to provide any reassurance or dispense any  
23 information whatsoever?

24 THE CLERK: I explained to her that I would advise  
25 the judge.



1 THE COURT: Okay. And then was there further  
2 communication with juror 11 after you had advised the Court?

3 THE CLERK: Yes.

4 THE COURT: What did you advise?

5 THE CLERK: I advised the juror that I spoke to the  
6 judge and that there's a court security officer is posted  
7 outside the courtroom. That any further concerns that she may  
8 have, please bring it to my attention. But the Court security  
9 officer wears a Navy blazer, gray slacks, has a badge for  
10 their identification. And that that's their job to monitor  
11 the coming and going of individuals outside the courtroom.

12 THE COURT: Okay. Did you have any further  
13 communication with juror No. 11 on this topic?

14 THE CLERK: No, generally that was it.

15 THE COURT: Did you have communication with juror  
16 No. 5 on this topic?

17 THE CLERK: Yes, I did.

18 THE COURT: And tell me about that.

19 THE CLERK: Juror No. 5 indicated to me that he has  
20 noticed the same thing that juror No. 11 noticed.

21 THE COURT: And did he otherwise characterize it as  
22 what it was that he was noticing?

23 THE CLERK: Not as detailed as juror No. 11.

24 THE COURT: Okay. And did you -- how did you react  
25 to juror No. 5's statements, did you say anything in

1 particular to him.

2 THE CLERK: Just the general response that I advised  
3 the judge, and basically what I just advised the Court.

4 THE COURT: And did you say anything else to juror  
5 No. 5 after you had advised the Court, was there any specific  
6 additional conversation with him?

7 THE CLERK: I think it was done collectively.

8 THE COURT: Okay.

9 THE CLERK: As a group.

10 THE COURT: Thank you. Mr. Goldsmith, you may be  
11 seated. And that's the conclusion of Mr. Goldsmith's  
12 statement for the record. The request of the defendant is  
13 denied.

14 (11:58 a.m., end of excerpted proceedings.)

15 I, Christine Asif, RPR, FCRR, do hereby certify that  
16 the foregoing is a correct transcript from the stenographic  
17 record of proceedings in the above-entitled matter.

18 /s/  
Christine T. Asif  
19 Official Court Reporter  
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